



ALAN WILSON
ATTORNEY GENERAL

May 31, 2011

The Honorable H. Tom Rice, Jr.
Chairman, Horry County Council
P.O. Box 1236
Conway, SC 29528

Dear Mr. Rice:

We received your letter requesting an opinion of this Office concerning dual office holding. You asked whether your “service on the board of the [Myrtle Beach Regional Economic Development Corporation], and its executive committee, while Chairman of Horry County Council would constitute prohibited dual office holding.”

Law/Analysis

Article XVII, Section 1A of the state Constitution provides that “no person may hold two offices of honor or profit at the same time ...,” with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). “One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

This Office has advised on numerous occasions that one who serves on a city council would be considered an office holder for dual office holding purposes. See, e.g., Ops. S.C. Atty. Gen., March 17, 1995, February 4, 1994; July 23, 1993; August 14, 1992; and July 24, 1991. Therefore, it is clear that the chairman of the Horry County Council would most certainly be considered an office holder for dual office holding purposes.

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The question remains whether service on the Myrtle Beach Regional Economic Development Corporation, particularly in an ex officio capacity, would be considered office holding. As background, you mentioned that the Myrtle Beach Regional Economic Development Corporation (EDC) is a nonprofit corporation in good standing in South Carolina. You also explained that most of the funding for the EDC is provided by Horry County government and that "EDC membership includes an array of representatives from government, utilities, and private industry. Under its bylaws the chairman of Horry County Council is automatically designated a member of the board of directors as well as its executive committee. There is no compensation for this position. This is not an elected position. There is no oath of office." You also mentioned that the purpose of EDC is to promote and assist in the growth and development of Horry County, specifically job creation. The affairs of EDC appear to be conducted according to the South Carolina Nonprofit Corporation Act, Title 33, Chapter 31 of the S.C. Code of Laws.

This Office is not aware of any statute or ordinance of the Horry County Council that "has created the Corporation, established qualifications or duties of members of the Board of Directors, provided for an oath or compensation of members, provided a specific tenure for the members, or otherwise provided for the Corporation. Nor does it appear that the members of the Board are exercising a portion of the sovereign power of the State, though the mission of the Corporation certainly has public aspects." Op. S.C. Atty. Gen., March 17, 1995.

Also, it appears that this entity is quite similar to the Charleston Citywide Local Development Corporation, an eleemosynary corporation about which this Office opined on April 12, 1993. In the April 12, 1993 opinion, this Office concluded that "membership on the Board of Directors was deemed not to be holding an office for dual office holding purposes." Op. S.C. Atty. Gen., April 12, 1993. This Office has examined membership on a number of boards of directors of eleemosynary corporations, in the context of dual office holding, concluding each time that such membership would not constitute an office for purposes of dual office holding purposes. See, e.g., Ops. S.C. Atty. Gen. April 12, 1993 (in addition to the Charleston Citywide Local Development Corporation, addressed the Community Young Men's Christian Association of Rock Hill, S.C.); January 11, 1991 (addressed membership on the Francis Marion Foundation); October 18, 1988 (addressed the Children's Trust Fund of South Carolina); September 8, 1987 (Horry County Council on Aging); and October 20, 1983 (York County Council on Aging, Inc.). There is no discernable reason to treat the Myrtle Beach Regional Economic Development Corporation any differently.

Therefore, it is the opinion of this Office that membership on the Board of Directors or on the executive committee of the Myrtle Beach Regional Economic Development Corporation would not be considered an office for dual office holding purposes.

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You also asked whether you should recuse yourself from voting on matters related to EDC, particularly issues of funding. Although we do not believe a councilmember's service on the EDC's board of directors or executive committee constitutes dual office holding, we believe that simultaneous service in both roles may at times creates a conflict of interest. Our Supreme Court in McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913) explained the rationale for the prohibition against master-servant conflicts of interest:

No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.

McMahan, 94 S.C. 362, 365.

In prior opinions, we described when a conflict of interest exists as follows:

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.

Ops. S.C. Atty. Gen., October 22, 2007; May 21, 2004; January 19, 1994. We suggest you seek guidance from the State Ethics Commission regarding any potential conflicts of interest that may exist due to simultaneous service in both capacities.

Conclusion

It is well established that one serving on county council is considered an officer for dual office holding purposes. However, one serving on the board of directors or executive committee of the Myrtle Beach Regional Economic Development Corporation would not be considered an officer for dual office holding purposes as there is no exercise of sovereign power of the State.¹

Therefore, it is the opinion of this Office that one simultaneously serving as chairman of the Horry County Council and serving on the Board of Directors or executive committee of the

¹ One should note that even if such a position was deemed to be an office, the ex officio status of the city council members serving on the Corporation would remove any dual office holding difficulty. See, Op. S.C. Atty. Gen., March 17, 1995; Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947).

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Myrtle Beach Regional Economic Development Corporation would not be in violation of the dual office holding provision in the SC Constitution.

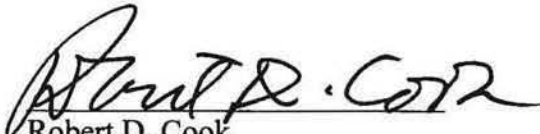
In the event you believe there may be ethics questions to be addressed, please contact the State Ethics Commission. This Office respectfully defers questions regarding ethics matters to their office.

Sincerely,



Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General